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No. 85-427

In The

Supreme Court of the United States

October Term, 1985

JACK P. McGEE,

Plaintiff-Petitioner,

v.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BRUNSWICK,

Defendant-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RICHARD A. BROWN, JR.
JOHN E. BUMGARTNER
Post Office Box 220
Brunswick, Georgia 31521
(912) 264-8544

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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STATEMENT OF THE CASE

In his amended complaint in this case (R.10-15) the plaintiff alleged that the defendant had committed violations of the antitrust laws and had also violated the Bank Holding Company Act, 12 U.S.C. § 1972, all in connection with the manner in which the defendant allegedly commissioned real estate appraisals on property which its loan customers were seeking to use as security for a loan. The defendant's practices in this regard were alleged to have harmed the plaintiff's independent real estate appraisal business.

Throughout the course of this litigation the plaintiff has based his claims upon his contention that the defendant had influenced and coerced its loan customers to utilize the appraisal services of First Shelter Service Corporation, a wholly owned subsidiary corporation of defendant, and that the defendant entered into agreements with its subsidiary, First Shelter, to exclude the plaintiff from the business of providing residential and commercial real estate appraisal services in the geographic market served by the defendant. *See,* plaintiff's own statement of his contentions contained in the two separate consolidated pre-trial orders prepared by the parties in this case (R. 119-120; 234-235) and *see also,* plaintiff's own Statement of Facts, filed in opposition to defendant's Motion for Summary Judgment (R.152; 155).

First Shelter Service Corporation is a wholly owned subsidiary corporation of First Federal Savings and Loan Association of Brunswick, and the primary purpose of First Shelter Service Corporation is to perform real estate appraisals (R.100; 150-157—defendant's Statement of Facts as to which there is no genuine issue for trial and

plaintiff's response thereto).[1] At all times pertinent to this case First Shelter Service Corporation has performed real estate appraisals for First Federal Savings and Loan Association and for other banks and financial institutions and for the general public, though First Shelter performs appraisal services primarily for financial institutions (R. 100-101; 150-157).

At all times pertinent to this lawsuit the defendant maintained an approved list of appraisers, which at all times included numerous appraisers who were not employed by First Shelter Service Corporation. (R.101; 150-157).

It is a *uniform* banking practice for Banks and Savings and Loan Associations, in making real estate loans, to require appraisals on the property to be used as security for the loan, prior to making the loan. In fact, a Federal Savings and Loan Association is required by federal law to commission such an appraisal before making a real estate loan and is required by federal law to obtain such an appraisal from a qualified person designated by the Savings and Loan Association (R.101; 150-157).

The plaintiff was fired from his job at First Shelter Service Corporation in 1979 and alleges that he started his own independent appraisal service business in March of 1979. The plaintiff complains that he was taken off of First Federal's approved list of appraisers in 1980, and his complaint is that, regardless of whether or not his name was on the approved list of appraisers, First Federal sent substantially all of its appraisal business to

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[1]To the extent that a Statement of Facts filed in conjunction with a Motion for Summary Judgment is not controverted, the facts not controverted are deemed admitted under Local Rule 6.6, S.D. Ga.

First Shelter and that no one on the approved list of appraisers who was not employed by First Shelter, was getting any significant appraisal business from First Federal (R.101; 150-157).

According to the plaintiff's version of the facts, First Federal Savings and Loan Association was doing thirty to forty percent of the mortgage loan business in Glynn County, Georgia during the years that he attempted to operate his independent appraisal service business (R.104; 150-157). The plaintiff also testified by affidavit that the defendant commissioned approximately forty percent of the appraisal business in Glynn County to First Shelter (R.159).

The defendant, First Federal Savings and Loan Association, is not itself in the business of performing real estate appraisals (R.76). Whenever a loan customer of First Federal applies for a real estate loan, First Federal collects an appraisal fee at the same time that it takes the application and then itself commissions an appraisal of the property which the customer seeks to use as security for the loan, usually through First Shelter (R.102: 150-157; 180-181).

First Federal's customers have at all times been free to commission their own appraisal by an appraiser of their own choice, but the customers would in that situation have to bear that expense, and would also have to bear the expense of the appraisal commissioned by First Federal. First Federal's customers have at all times been free to seek real estate loans from other lending institutions if for some reason they did not like First Federal's policy with regard to real estate appraisals (R.105; 150-157).

SUMMARY OF ARGUMENT

The District Court and Court of Appeals correctly concluded that with regard to the plaintiff's contentions under the Bank Tying Act, 12 U.S.C. § 1972, the plaintiff's claims and contentions did not even implicate two distinct products since it is the lending institution, rather than the loan applicant, which is the consumer of the loan related appraisal services. It is the respondent which commissions the appraisal, as a matter of fact. As a matter of law the respondent is required to do so by federal regulation. The appraisal is performed for the benefit of the lending institution, to ensure that there is sufficient security for the loan and the District Court and the Court of Appeals both concluded correctly under the facts and under the law that the plaintiff's contentions in this case did not even implicate two separate products. The District Court's Judgment in favor of the defendant on the Bank Tying Act claims and the Court of Appeals' affirmance of that Judgment are correct for additional reasons urged by the defendant but not reached by the trial Court or by the Court of Appeals.

The District Court and Court of Appeals also correctly concluded that, as matter of law, plaintiff's contentions that the defendant violated 15 U.S.C. § 1 by combining and conspiring with its wholly owned subsidiary corporation relative to the commissioning of appraisals or the establishment of its list of approved appraisers, failed to state a claim and was subject to dismissal for the reason that a parent corporation and its wholly owned subsidiary are incapable of engaging in the concerted activity prohibited by 15 U.S.C. § 1.

The District Court and the Court of Appeals correctly concluded that the plaintiff's allegations in this case failed to implicate two separate products and therefore plaintiff's claims of an allegedly unlawful tying arrangement failed under the Sherman Act as well as under the Bank Tying Act.

ARGUMENT

I.

The District Court And Court Of Appeals Correctly Disposed Of Plaintiff's Claims Under The Bank Typing Act, 12 U.S.C. § 1972

The 1970 amendments to the Bank Holding Company Act, 12 U.S.C. § 1971 *et seq.* prohibit banks from engaging in certain tying arrangements and generally prohibit a bank from conditioning the extension of credit to a requirement that the borrower obtain some additional credit, property or service from the bank, or provide some additional credit, property or service to the bank.

There are essentially two reasons why the plaintiff fails to set forth any viable claim for an alleged violation of 12 U.S.C. § 1972. First of all, it is abundantly clear that the appraisal which the defendant is required to obtain as a matter of federal law, before making any real estate loan, is commissioned *by First Federal Savings and Loan Association,* and in fact federal law requires the appraisal to be commissioned by the Savings and Loan Association, from a qualified person *designated by* the Savings and

Loan Association. *See,* 12 C.F.R. § 545.32(b) (1). The charge for the appraisal is a charge which is passed onto the borrower (12 C.F.R. § 3500.7), but the borrower is not required to go out and obtain the appraisal himself. Thus, under the plaintiff's complaint and under the plaintiff's theory of the case and under his own version of the facts and under the undisputed facts in this case, it is clear that the conduct complained of in this case simply does not involve the defendant requiring its customers to go out and obtain or provide some additional credit, property or service (i.e., an appraisal) as a condition for the extension of credit by First Federal. As the District Court and Court of Appeals correctly held, the appraisal is commissioned by the bank, for the benefit and protection of the bank. The bank is the "consumer" of the appraisal service, rather than the borrower. Thus, the threshold element of a claim under 12 U.S.C. § 1972 is entirely missing.

Furthermore, even assuming that the plaintiff were able to get over this threshold requirement, no claim whatsoever is set forth in this case for an alleged violation of 12 U.S.C. § 1972 because 12 U.S.C. § 1972(1) (C) expressly excludes from the strictures and prohibition of the Act, any requirement that a bank customer obtain or provide some additional credit, property or service in return for the extension of credit by the bank, *which is related to and usually provided in connection with a loan, discount, deposit or trust service.* Based upon this section of the statute, the rule has been developed that in order to show a violation of 12 U.S.C. § 1972, a plaintiff must first show that the particular method chosen by the bank to protect its investment is a method which is not commonly used and which can be deemed an "unusual" banking practice.

Of course this case involves what the plaintiff himself concedes to be a *uniform banking practice* (R.101; 150-157), and in fact one required by federal law, namely that before a Federal Savings and Loan Association, such as the defendant in the case *sub judice,* will make a real estate loan, it requires that an appraisal be made of the property to be pledged as security for that loan, conducted by a qualified appraiser designated by the lending institution. Inasmuch as the practice complained of in this case is a uniform banking practice, and is one which is in fact required by federal law, no conceivable claim is stated by the plaintiff under 12 U.S.C. § 1972, even assuming that the plaintiff could overcome the threshold requirement that a bank customer must be required to himself obtain or provide some additional credit, property or service before 12 U.S.C. § 1972 is even applicable on its own terms. *See generally, McCoy v. Franklin Savings and Loan Association,* 636 F.2d 172 (7th Cir. 1980); *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242 (11th Cir. 1982).

II.

The District Court And The Court Of Appeals Correctly Concluded That Plaintiff's Claims Under 15 U.S.C. § 1 Were Precluded By This Court's Decision In Copperweld Corporation v. Independence Tube Corporation, — U.S. —, 52 U.S.L.W. 4821 (1984)

On June 19, 1984 this Court rendered its decision in the case of *Copperweld Corporation v. Independence Tube Corporation,* — U.S. —, 52 U.S.L.W. 4821 (No. 82-1260; 6-19-84), 81 L.Ed. 2d 628 (1984). In that case the Court held squarely and without exception or qualification, that

a parent corporation and its wholly owned subsidiary corporation are " . . . incapable of conspiring with each other for purposes of Section 1 of the Sherman Act," *Id.*, at 4828.

In the case *sub judice* the plaintiff, by his own pleadings and admissions, bases his antitrust claims upon the contention that the defendant, First Federal Savings and Loan Association of Brunswick, combined and conspired with its wholly owned subsidiary First Shelter Service Corporation, in making allegedly anti-competitive agreements impacting upon the plaintiff's appraisal business. There is no dispute in this case about the fact that First Shelter Service Corporation is a wholly owned subsidiary corporation of the defendant, First Federal Savings and Loan Association of Brunswick. Thus, under the ruling of the Supreme Court in *Copperweld, supra,* any and all claims asserted by the plaintiff under Section 1 of the Sherman Act, 15 U.S.C. § 1, were subject to dismissal, or in the alternative defendant was entitled to a Summary Judgment thereon.

Plaintiff's attempt to distinguish this Court's ruling in *Copperweld* lacks any merit. The plaintiff argues that the Court's decision in *Copperweld* has no application to the case *sub judice* because this case involves a business in a "regulated environment" where, under federal banking laws, the defendant could not itself engage directly in the business of making appraisals of real estate, but is allowed to create a wholly owned subsidiary service corporation to do so.

This argument ignores and misrepresents the very plain holding of the Court in *Copperweld, supra,* where the Court reasoned as follows:

1. The Sherman Act contains a basic distinction between concerted and independent action. The conduct of a single firm, (i.e., independent action) is governed by Section 2, 15 U.S.C. § 2, alone and is unlawful only when it threatens actual monopolization. On the other hand, Section 1 of the Sherman Act, 15 U.S.C. § 1, reaches unreasonable restraints of trade effected by a contract, combination or conspiracy between *separate* entities. It does not reach conduct that is wholly unilateral, *Id.* at 4825.

2. The coordinated activity of a parent corporation and its wholly owned subsidiary corporation must be viewed as that of a single enterprise for purposes of Section 1 of the Sherman Act. This is so because a parent and its wholly owned subsidiary have a complete unity of interest. Their objective are common rather than disparate and their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. With or without a formal "agreement" the subsidiary corporation acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for scrutiny under Section 1 of the Sherman Act, *Id.* at 4826.

3. Accordingly, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary corporation lacks any

meaning. In reality a parent and wholly owned subsidiary corporation *always* have a unity of purpose or a common design. They share a common purpose whether or not the parent keeps a tight reign over the subsidiary because the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interest, *Id.* at 4826.

4. The appropriate inquiry is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anti-competitive effects. Nor is it whether the term "conspiracy" will bear a literal construction that includes parent corporations and their wholly owned subsidiaries. Rather, the appropriate inquiry requires an explanation of the logic underlying Congress' decision to exempt unilateral conduct from scrutiny under Section 1 the Sherman Act, *Id.* at 4827.

5. Unless a Court takes it upon itself to second guess the judgment of Congress in limiting Section 1 of the Sherman Act to concerted conduct, the only conclusion which can be reached is that the coordinated behavior of a parent corporation and its wholly owned subsidiary corporation, falls outside of the reach of Section 1 of the Sherman Act, 15 U.S.C. § 1, *Id.* at 4827-4828.

Thus, it can readily be seen that the Supreme Court's decision in *Copperweld* permits no exception or qualification for parent corporations and wholly owned subsidiaries which operate in a "regulated environment." The fundamental point is the reality that *in every case* a parent

corporation and its wholly owned subsidiary " . . . *always* have a 'unity of purpose or a common design.' They share a common purpose whether or not the parent keeps a tight reign over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parents best interest," *Id.* at 4826 (emphasis in original). Accordingly, the coordinated activity of a parent corporation and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of Section 1 of the Sherman Act, *Id.*, thus rendering any such activity outside of the reach of that statute, *Id.* at 4828.

Furthermore, in reaching this conclusion the Court expressly repudiated the idea that the parent corporation's motivation in creating the wholly owned subsidiary has any relevance to the inquiry:

> "The economic, legal or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition. Rather, a corporation may adopt the subsidiary form of organization for valid management and related purposes. Separate incorporation may improve management, avoid special tax problems arising from multistate operation, or serve other legitimate interests.[20] Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing exposure to antitrust liability." *Id.* at 4826-4827.

Among the "other legitimate interests" for the adoption of a subsidiary corporation, hypothesized by the Supreme Court at page 4826, note 20 is that:

"Separate incorporation may reduce federal or state taxes *or facilitate compliance with regulatory or reporting laws,*" *Id.* at 4826, note 20 (emphasis added).

In short, the Supreme Court has expressly rejected the idea that a parent corporation's motivation in creating a wholly owned subsidiary corporation, including the motivation of compliance with regulatory laws, has any bearing whatsoever on the issue of whether coordinated activity by a parent corporation and its wholly owned subsidiary falls within the ambit of Section 1 of the Sherman Act.

Defendant respectfully submits that for these reasons the plaintiff's attempt to distinguish *Copperweld* must fail.

III.

The District Court And Court Of Appeals Correctly Concluded That The Plaintiff's Claims Of An Unlawful Tying Arrangement Fail Because Only One Product Was Implicated Rather Than Two

Before a Federal Savings and Loan Association such as the defendant herein may made a loan secured by real estate, it is *required* by federal law to obtain an appraisal of the security property, from a qualified appraiser *designated by the savings and loan association. See,* 12 C.F.R. § 545.32(b)(1). Thus, as a matter of law the appraisal is obtained *by* the savings and loan association and *for the benefit* of the savings and loan association, which after all is parting with its money based upon the value of the property pledged as security and which therefore must ensure that the property has sufficient value to protect its interests. The appraisal must as a matter of law be performed by a qualified appraiser designated by the savings

and loan association before the savings and loan association can make any loan secured by real estate. The appraisal of the security property is a settlement service, the charge for which may be billed to the borrower, and the savings and loan association is only required to provide the borrower with a good faith estimate of what that charge might be. *See,* 12 C.F.R. § 3500.7. A savings and loan association is under no obligation or duty to disclose to a borrower whether or not the appraiser which it designates has a business relationship with the lender.

Furthermore, a Federal Savings and Loan Association, such as the defendant herein, is expressly authorized by federal law to invest in the capital stock, obligations or other securities of a solely owned service corporation, 12 C.F.R. § 545.74 and one of the permitted activities of such a solely owned service corporation is the *performance of appraisal services primarily for financial institutions,* and all other activities reasonably incidental to the performance of such appraisal services. *See,* 12 C.F.R. § 545.74(c) (2) and (6).

The plaintiff's antitrust claims as well as his claims under the Bank Tying Act, 12 U.S.C. §1972, are premised upon the contention that the defendant engaged in an unlawful tying arrangement by "steering" its loan customers to its wholly owned subsidiary corporation, First Shelter, for the purpose of doing appraisals on the real property which the customers sought to use as security for a loan from First Federal. The foregoing discussion of the regulatory setting in which this claim arises, demonstrates that the plaintiff's claim of an unlawful tying arrangement is nonsensical. It is absolutely clear under the evidence in this case and indeed it is clear as a matter of

law, that when a customer comes into a federal savings and loan association seeking a loan and wishes to use real estate as security for the loan, the savings and loan association is required by law to commission an appraisal of the property sought to be used as security and to commission that appraisal from a qualified appraiser *designated by* the Board of the savings and loan association, 12 C.F.R. §545.32(b)(1).

As a matter of fact, the defendant herein is the party who commissions the appraisal, not the customer, and the appraisal is commissioned and performed for the bank's protection and benefit. The defendant in this case collects an appraisal fee from loan applicants at the time when application is made and the District Court and Court of Appeals were entirely correct in ruling that the appraisal is commissioned by the bank, for the bank's protection and benefit, and that the bank, rather than the borrower "consumes" the appraisal product, with the cost of the appraisal merely being passed along to the borrower in the same manner that all costs which a merchant incurs in doing business are passed along to its customers.

In addition to the foregoing, as a matter of law the conduct about which the plaintiff complains cannot represent an unlawful tying arrangement for an entirely separate and independent reason. In order for a plaintiff to prove an unlawful tying arrangement he must allege and prove that the defendant had an advantage not shared by its competitors in the market for mortgage financing. *See e.g., United States Steel Corporation v. Fortner Enterprises, Inc.*, 429 U.S. 610, 620 (1977); *Amis v. Gulf Abstract and Title, Inc.*, 564 F.Supp. 1121, 1127 n.8 (M.D. Fla. 1983). The plaintiff in this case did not even allege that any such

situation existed and under the plaintiff's own version of the facts the defendant only did thirty to forty percent of the mortgage loan business in Glynn County and commissioned only forty percent of the appraisal business in Glynn County. The defendant obviously does business within the same regulatory framework as its competitors, and is affected by the same economic fluctuations as its competitors. Plaintiff's claim of an alleged unlawful tying arrangement is thus entirely lacking in merit for this entirely separate and independent reason. *See also, Jefferson Parrish Hospital District Number 2 v. Hyde,* — U.S. —, 80 L.Ed. 2d 2, 13-14; 21-22 (1984).

In this case federal law *requires* that before a federal savings and loan association can make a loan secured by real estate, it must obtain an appraisal from a qualified appraiser, designated by the Board of the savings and loan association, 12 CF.R. §545.32(b)(1). Thus, whenever any borrower seeks to obtain a mortgage loan, the borrower is going to have to bear the cost of an appraisal no matter what federal savings and loan association he has chosen, even though in each instance it will be the bank which commissions the appraisal and chooses the appraiser, as required by federal law. In this case defendant's customers are free to utilize any lending institution that they want to use in seeking mortgage loan financing and all of the lenders in the area are affected equally by economic fluctuation and by interest rate fluctuations. There is simply no evidence whatsoever to support a contention that in seeking a mortgage loan from the defendant herein, a borrower would be forced to make a purchase (of an appraisal) which he would not otherwise make, or could make elsewhere on different terms.

CONCLUSION

For all of the reasons articulated above Respondent respectfully submits that the Petition should be denied.

RESPECTFULLY SUBMITTED, this 25th day of September, 1985.

DICKEY, WHELCHEL, BROWN
& READDICK

RICHARD A. BROWN, JR.
JOHN E. BUMGARTNER
Post Office Box 220
Brunswick, Georgia 31521
(912) 264-8544

Attorneys for Respondent